RECENT DECISIONS.

KARL W. KIRCHWEY, *Editor-in-Charge.*

ADJOINING LANDOWNERS—LANDLORD AND TENANT—LATERAL SUPPORT.—The plaintiff, whose husband leased from the defendant premises adjoining other lands of the defendant on which the latter had made an excavation, was injured by a collapse of the leased house in a landslide caused by the excavation. The plaintiff entered the premises knowing that the defendant owned the adjacent land, that landslides had occurred, and that weather conditions were wearing away the crest of the pit. *Held,* the defendant was not liable. *Beauchamp* v. *Excelsior Co. et al.* (1911) 127 N. Y. Supp. 686.

Although in the absence of warranty or fraud a lessor is clearly not liable for injuries resulting from defective premises, see *Tuttle* v. *Gilbert Mfg. Co.* (1887) 145 Mass. 169; *Phelan* v. *Fitzpatrick* (1905) 188 Mass. 237, it is equally well settled that one who comes to a nusiance is not for that reason precluded from recovering the damages which it causes him, though he come as a lessee. *Bly* v. *Edison Electric Co.* (1902) 172 N. Y. 1. Consequently the strict doctrine of *volenti non fit injuria* does not seem applicable to the facts of the principal case. See *Central R. R.* v. *English* (1884) 73 Ga. 366. Further, inasmuch as the ground of recovery is that the lessee has a separate estate, *Bly* v. *Edison Electric Co. supra,* it would seem immaterial whether a third party or the lessor owned the adjoining land, for *prima facie* the lease concerns only the leased premises, and the lessor is liable for injuries caused by the nuisance if the conditions constituting it are under his exclusive control. See *Dollard* v. *Roberts* (1891) 130 N. Y. 269; but see *Purcell* v. *English,* (1882) 86 Ind. 34. Even if premises lack sufficient lateral support when demised, the presumption would still seem to be that the lease carried it, as an appurtenance, see *Shury* v. *Pigot* (1625) 3 Bulstr. 339, the natural right of support from the lessor's adjoining land. See *Dalton* v. *Angus* (1881) L. R. 6 A. C. 740, 792, 809. The propriety of allowing this presumption to be overcome except by proof of an express stipulation releasing the right, seems questionable in view of the rule against derogating by implication from the estate demised. Therefore, while the result reached in the principal case may, perhaps, be justified by implying such a release as within the probable intention of the parties, it is submitted that by the better view the defendant was not relieved of his liability as adjoining owner.

APPEAL AND ERROR—OBJECTION TO TESTIMONY—WAIVER.—The plaintiff objected to certain evidence introduced by the defendant, but on cross-examination caused the witness to repeat the same testimony. *Held,* the objection was not thereby waived. *Cathey* v. *Mo., K. & T. Ry. Co. of Texas* (Tex. 1911) 133 S. W. 417.

When a party, who has objected to the admission of certain evidence, later introduces the same evidence his former objection is deemed to have been waived. *Briscoe* v. *Huff* (1898) 75 Mo. App. 288; see *Dohoney* v. *Womack* (1892) 1 Tex. Civ. App. 354. However, where evidence of the same nature is introduced merely in rebuttal,

a waiver is not to be implied, for by following the theory of the court in an endeavor to overcome the case made by his adversary the party excepting does not thereby admit the theory to be correct. *Washington Co.* v. *McCormick* (1898) 19 Ind. App. 663; *Salt Lake City* v. *Smith* (1900) 104 Fed. 457. Similarly, cross-examination on the objectionable testimony in an attempt to elicit evidence which will weaken its effect should not be held a waiver of a prior objection, *Laver* v. *Hotaling* (Cal. 1896) 46 Pac. 1070; *Marsh* v. *Snyder* (1883) 14 Neb. 237; but see *O'Donnell* v. *R. I. Co.* (1907) 28 R. I. 245, and the cross-examiner should be permitted, as he ordinarily is, *Zucker* v. *Karpeles* (1891) 88 Mich. 413, to endeavor to impeach the witness or to test his memory by asking him to repeat portions of his testimony in chief, even though the evidence objected to be brought out more fully by the cross-examination. *Donnell* v. *Braden* (1886) 70 Ia. 551; *contra, O'Donnell* v. *R. I. Co. supra.* It has been held, however, that the objection is waived if the witness fail to contradict himself in the repetition. *Sullivan* v. *Fant* (1908) 51 Tex. Civ. App. 6; see *State* v. *Moore* (1900) 156 Mo. 204. Unless the record clearly show that waiver of the exception was intended, see *United Rys. Co.* v. *Corbin* (1909) 109 Md. 442, the former rule would seem more desirable since the latter gives the party introducing incompetent testimony an unfair advantage by putting an arbitrary limit on the scope of the cross-examination, especially where the evidence is clearly harmful to the party excepting. The decision in the principal case would therefore seem correct.

BANKRUPTCY—PREFERENCE—RESTORATION OF EMBEZZLED TRUST FUND.—A trustee on the eve of bankruptcy, at the instance of his surety, deposited securities of his own with the trust fund to make up a shortage caused by his embezzlement. His trustee in bankruptcy brought an action against the successor in the trust to recover the substituted securities. *Held,* the plaintiff could recover since the transaction constituted a preference under Bankruptcy Act of July 1, 1898, c. 541 § 60b. *Clarke* v. *Rogers* (1910) 183 Fed. 518.

When a trustee converts trust funds to his own use a quasi-contractual duty arises to repay the *cestui que trust, Hall* v. *Marston* (1822) 17 Mass. 575; see *Thompson* v. *Finch* (1856) 8 DeG. M. & G. 560, and the right to enforce this obligation, while elective if the funds are traceable, 1 COLUMBIA LAW REVIEW 328, is all that remains to the *cestui* when the *res* can no longer be followed. *Lathrop* v. *Bampton* (1866) 31 Cal. 17. The beneficiary is clearly brought within the definition of a creditor given in the Bankruptcy Act, § 1, and he is then entitled to no preference over general creditors. See *Smith* v. *Township of Au Gres* (1906) 150 Fed. 257; *Thompson's Appeal* (1853) 22 Pa. St. 16. In England, on the contrary, it has been held that the relation of debtor and creditor does not exist, within the meaning of the bankruptcy statute, between a defaulting trustee and his co-trustee or *cestui. Ex parte Taylor* (1886) L. R. 18 Q. B. D. 295; *Ex parte Ball* (1857) 35 W. R. 264. The later English cases, however, adopt the theory that when the bankrupt's dominant motive in making restoration is to avoid criminal prosecution, *Sharp* v. *Jackson* L. R. [1899] App. Cas. 419, or merely to right a wrong, *In re Lake* L. R. [1901] 1 Q. B. D. 710, no act of preference is committed, thus confusing motive with intent and limiting the effect of the statute in an unwaranted manner. In America, while stress has properly been placed on the intention with which an insolvent pays a debt in order

to determine questions of preference, *Hardy* v. *Gray* (1906) 144 Fed. 922, motive appears never to have been considered a controlling feature. The principal case would therefore seem to reach a conclusion beyond question. *Cf. McNaboe* v. *Columbian Mfg. Co.* (1907) 153 Fed. 967.

BANKS AND BANKING—NEGLIGENCE OF COLLECTING BANK—RIGHTS OF DEPOSITOR.—The defendant sent a check deposited by the plaintiff with it for collection directly to the drawee, the only bank in its community, which, having surrendered it to the drawer without remitting the amount, failed. *Held,* the defendant was liable for the amount of the check in an action for money had and received. *Pinkney* v. *Kanawha Valley Bank* (W. Va. 1911) 69 S. W. 1012.

Since generally the obligation of a bank receiving for collection paper drawn upon a distant bank is limited to the use of reasonable diligence in the selection of a sub-agent, 11 COLUMBIA LAW REVIEW 163, it is liable only for its own negligence. A bank is not a suitable agent, however, for the collection of a claim against itself, since its interest is adverse to that of the creditor, *German Nat. Bank* v. *Burns* (1889) 12 Colo. 539, and it may relieve the drawer of liability by cancelling and surrendering the paper. *O'Leary* v. *Abeles* (1900) 68 Ark. 259. It is therefore negligence *per se* to send a check for collection directly to the drawee bank. *Western Scraper Co.* v. *Sadilek* (1897) 50 Neb. 105; *contra, Heywood* v. *Pickering* (1874) L. R. 9 Q. B. 428. As contracting parties are presumed to contemplate performance according to custom only when the custom is reasonable, *Drovers' Nat. Bank* v. *Provision Co.* (1886) 117 Ill. 100, and since, by the general rule, sending paper directly to the drawee bank is unreasonable even though it is the only bank in the community, the collecting bank adopts such a custom at its peril, unless clearly authorized by the depositor, *First Nat. Bank* v. *Citizens' Savings Bank* (1901) 123 Mich. 336, and for the resulting loss is liable either in tort or in assumpsit for the breach of its obligation to use due diligence. See note to *Winchester Milling Co.* v. *Bank of Winchester* (Tenn. 1908) 18 L. R. A. [N. S.] 441; *American Exchange Bank* v. *Metropolitan Bank* (1897) 71 Mo. App. 451; *First Nat. Bank* v. *Bank of Whittier* (1906) 221 Ill. 319. Although recovery as for money had and received is permitted in cases where a collecting bank, having accepted paper of the drawee without authority, is presumably estopped to deny that its customer's claim has been paid, *Landa* v. *Traders' Bank* (1906) 118 Mo. App. 356, to allow it under the circumstances of the principal case is anomalous since the defendant had received nothing.

CHATTEL MORTGAGES—STOCK IN TRADE—POWER OF DISPOSAL RETAINED BY MORTGAGOR.—The plaintiff sought to prove as a preferred claim in bankruptcy certain notes secured by a mortgage on the bankrupt's stock in trade, executed several years prior to bankruptcy, the property having since remained in the possession of the mortgagor and used by him in the usual course of trade. *Held,* the mortgage was void as a matter of law. *Ritchie Co. Bank* v. *McFarland* (C. C. A. 4th C. 1910) 183 Fed. 715.

The early English theory was that a mortgage which left the mortgagor in possession of the mortgaged property with the power to dispose of it was fraudulent as a matter of law. See *Ryall* v. *Rolle* (1749) 1 Wils. 260. This doctrine was once favored by the Federal

courts, see *Robinson* v. *Elliott* (1874) 22 Wall. 513, and has been followed by a large number of the States. *Blakesley* v. *Rossman* (1877) 43 Wis. 116; *Southward* v. *Benner* (1878) 78 N. Y. 424; *contra, Wingler* v. *Sibley* (1876) 35 Mich. 231; *cf. Briggs* v. *Parkman* (Mass. 1841) 2 Metc. 258. The rule has long since been adopted in England, however, that the question of fraud is one of fact to be determined by the jury. *Ex parte Games* (1879) 40 L. T. [N. S.] 789; Jones, Chattel Mortgages § 413. While previous to the now universal statutes substituting registration for change of possession, the secrecy of the transaction gave some justification for the former doctrine, this reason seems to be no longer applicable, see *Miller* v. *Jones* (1876) Fed. Cas. 9,576; *Peabody* v. *Landon* (1889) 61 Vt. 318, and the modern decisions, therefore, tend to confine the old rule either to cases where the mortgage itself stipulates for the continued control by the mortgagor, *Hitchler* v. *Citizens Bank* (1885) 63 Miss. 403, or to cases where there is no provision for the application of the proceeds of sales by the mortgagor. *Etheridge* v. *Sperry* (1891) 139 U. S. 266; *Brackett* v. *Harvey* (1883) 91 N. Y. 214. It would seem, therefore, that the decision of the principal case is out of harmony with the weight of authority, 1 Cobbey, Chattel Mortgages § 307, and fails to meet the needs of commerce as indicated by its persistent use of such securities in spite of legal obstacles. Jones, Chattel Mortgages § 425. The court seems, however, to have been bound by controlling authorities in its own jurisdiction. *Garden* v. *Bodwing's Admx.* (1876) 9 W. Va. 121.

CONSTITUTIONAL LAW—CORPORATION TAX—INCOME FROM MUNICIPAL BONDS.—The income from municipal bonds held by the defendant was taxed under the Corporation Tax Law (c. 6, 36 U. S. Stat. at L. 112) which imposes upon all corporations doing business in the United States "a special excise tax * * * equivalent to one *per centum* upon the entire net income over and above $5,000 received by it from all sources." *Held,* Congress had power to include the income from such bonds. *Flint v. Stone Tracy Co.* (1911) 31 Sup. Ct. Rep. 342.

While the measure of a tax on property having ascertainable value may not include the value of non-taxable property, *Home Savings Bank* v. *Des Moines* (1907) 205 U. S. 503, if the tax is imposed on a right or occupation subject to the taxing power, any uniform measure, however arbitrary, may be adopted. *Home Ins. Co.* v. *New York* (1890) 134 U. S. 594; *United States* v. *Singer* (1872) 15 Wall. 111. It is therefore immaterial that the value of, or the income from, non-taxable subject-matter, such as Federal securities, is included in determining the amount of the tax. *Murdock* v. *Ward* (1900) 178 U. S. 139; *Hamilton Co.* v. *Massachusetts* (1867) 6 Wall. 632. This rule has not, however, been applied by the Supreme Court to taxes measured so as indirectly to burden imports, *Cook* v. *Pennsylvania* (1878) 97 U. S. 566, or interstate or foreign commerce. Jealous of every possible infringement upon the Federal power to control commerce the court has invalidated any tax having such an effect. 11 COLUMBIA LAW REVIEW 393. Thus, as a State may not tax the privilege of carrying on interstate commerce within it, *Phila. Steamship Co.* v. *Pennsylvania* (1887) 122 U. S. 326; *Galveston etc. Ry. Co.* v. *Texas* (1908) 210 U. S. 217, neither may it include the capital employed in, or profits derived from, such commerce in its tax upon purely intrastate business. *W. U. Tel. Co.* v. *Kansas* (1910) 216 U. S. 1, 27;

but see *Maine* v. *Grand Trunk Ry. Co.* (1891) 142 U. S. 217, 228. Where, however, the court finds no such interference by the State with exclusive powers of Congress, it regards the measure of the tax as immaterial. *Pullman Co.* v. *Adams* (1903) 189 U. S. 420; *Horn Silver Mining Co.* v. *New York* (1892) 143 U. S. 305, 313. Moreover, as the court has sustained state taxes which incidentally affected United States securities, *Plumer* v. *Coler* (1900) 178 U. S. 115, 134; *Society for Savings* v. *Coite* (1867) 6 Wall. 594, 607, not fearing that impairment of the Nation's borrowing capacity might result, *Plumer* v. *Coler supra,* 135, the conclusion reached in the principal case is in harmony with prior adjudications.

CONSTITUTIONAL LAW—CORPORATION TAX—INCOME FROM REAL PROPERTY.—Under § 38 of the Act of Congress approved August 5, 1909 (c. 6, 36 Stat. at L. 112) which subjects every corporation engaged in business within the United States to "a special excise tax * * * equivalent to one *per centum* upon the entire net income over and above $5,000 received by it from all sources" such a tax was imposed on income from real property. *Held,* the tax being on the corporate privilege, it was not direct within the meaning of Art. 1, sec. 9, cl. 4 of the Constitution. *Flint* v. *Stone Tracy Co.* (1911) 31 Sup. Ct. Rep. 342.

A tax on the income derived from real and personal property has been declared direct as in its essence a tax on the property itself. *Pollock* v. *Farmers' Loan & Trust Co.* (1895) 157 U. S. 429, 580, 158 U. S. 601, 627; but see *Springer* v. *United States* (1880) 102 U. S. 586; 9 Harv. L. Rev. 198; 10 COLUMBIA LAW REVIEW 379, 401. On the other hand, a tax levied upon a particular business, *Spreckels Sugar Ref. Co.* v. *McLain* (1904) 192 U. S. 397; *Pacific Ins. Co.* v. *Soule* (1868) 7 Wall. 433, a corporate franchise, *Home Ins. Co.* v. *New York* (1890) 134 U. S. 594, or the right of inheritance, *Scholey* v. *Rew* (1874) 23 Wall. 331; *Knowlton* v. *Moore* (1900) 178 U. S. 41, is considered an excise although measured by the income from, or the value of, the property concerned. Since the *Pollock* case *supra* did not purport to overrule these decisions, the inevitable distinction seems to be that where the tax is levied on property simply because of ownership it is direct, but where it is imposed on a particular use of property or the exercise of a right it is an excise, and as such may be measured by any standard conforming to the rule of uniformity. See *Knowlton* v. *Moore supra,* 82. As no analogy can be drawn from taxes affecting imports or interstate commerce, see discussion of "Income from Municipal Bonds" *supra,* it follows that the Supreme Court, in upholding the tax on the corporate privilege as to incomes from real property and invested personalty, has but more clearly enunciated the rules laid down in earlier decisions.

CONSTITUTIONAL LAW—DUE PROCESS—ABSOLUTE LIABILITY FOR INJURY TO EMPLOYEE.—The New York Workmen's Compensation Act (Laws 1910, c. 674) art. 14a, provided that employers in certain dangerous employments should compensate employees injured as a result of risks inherent in the business. *Held,* reversing the Appellate Division, the statute, in imposing an absolute liability irrespective of fault or negligence, violated the due process clause of the state Constitution. *Ives* v. *South Buffalo Ry. Co.* (N. Y. Ct. App. 1911) 94 N. E. 431.

For a discussion of this case supporting the decision of the Special

Term in favor of the constitutionality of the statute, see 10 COLUMBIA LAW REVIEW 751. In view of the conceded desirability, from an economic standpoint of the legislation in question, the court's conception of "due process" as necessarily exclusive of such a statutory modification of the common law theory of liability seems at least unfortunate, necessitating, as it does, the adoption of an exception to the due process clause in the state Constitution in order to secure the readjustment of the relations of employer and employee demanded by public opinion. A broader view of what constitutes due process, exemplified in a recent decision of the United States Supreme Court, *Noble State Bank* v. *Haskell* (1911) 219 U. S. 104, seems equally sound in theory and avoids the undesirable distinction, drawn by the court in the principal case, between legal justice and the demands of public policy. The accepted requirement for a valid exercise of the police power, that the means adopted in furtherance of the public welfare must bear some reasonable relation to the end sought, 10 COLUMBIA LAW REVIEW 55, would seem a sufficient safeguard of private rights even in the event of a radical legislative alteration of the common law, without the additional restriction imposed upon that power by the Court of Appeals.

CONSTITUTIONAL LAW—INTERSTATE COMMERCE—MUNICIPAL LICENSES.—The plaintiff express company, engaged chiefly in interstate commerce, sought to enjoin the defendant from enforcing an ordinance which imposed a license fee of $5 on each express wagon operated in the city and fifty cents on each driver, whose competence had to be vouched for by two citizens, and which required of expressmen a bond for each wagon, conditioned upon the safe delivery of property intrusted to them. *Held,* a preliminary injunction should not be granted. *Barrett* v. *City of New York* (C. C. S. D. N. Y. 1911) 183 Fed. 793.

Although Congress has exclusive power over interstate commerce in matters of national importance susceptible of uniform regulation, *Robbins* v. *Shelby Tax Dist.* (1886) 120 U. S. 489, the States under their police power have the right to impose such regulations in local matters as are conducive to the safety of the public in person and property, although interstate commerce may indirectly be affected. *Smith* v. *Alabama* (1887) 124 U. S. 465; *Western Union Co.* v. *New Hope* (1903) 187 U. S. 419. To defray the expenses of such regulations fees may be imposed to cover the reasonably estimated cost of their enforcement, *Atl. Tel. Co.* v. *Philadelphia* (1902) 190 U. S. 160, although a State may not impose a license fee as a condition precedent to the right of a company to engage in interstate commerce within its borders, *Crutcher* v. *Kentucky* (1890) 141 U. S. 47; *Simpson, Crawford Co.* v. *Atl. Highlands* (1908) 158 Fed. 372; *contra, Wiggins Fy. Co.* v. *East St. Louis* (1882) 107 U. S. 365; but see *Leloup* v. *Mobile* (1887) 127 U. S. 640, 647, even if imposed without discrimination. *Robbins* v. *Shelby Tax Dist. supra.* It thus becomes largely a matter of construction in each case as to the effect of the particular statute whose validity is questioned. See *Houston R. R.* v. *Mayes* (1906) 201 U. S. 321. As the ordinance in the principal case clearly was not designed for purposes of revenue it would seem to be a legitimate exercise of the State's police power in view of its obvious bearing on the safety of the property of the public, although as an attempt to regulate the city streets it would be open to serious objection as a discriminatory

measure. The decision is further fortified by the fact that the motion was for a preliminary injunction and it did not appear that the plaintiff would suffer irreparable injury before final hearing.

CORPORATIONS—DIVIDENDS—RECOVERY OF DISTRIBUTED ASSETS.—An action was brought by the trustee of a bankrupt corporation to recover dividends alleged to have been accepted by the defendant, the sole stockholder, with knowledge that they were paid from the capital, in violation of a statute. The payments were made prior to insolvency, and were not its cause. *Held,* a cause of action was stated. *Cottrell* v. *Albany Card & Paper Mfg. Co.* (1911) 126 N. Y. Supp. 1070.

The doctrine that the capital of a corporation constitutes a trust fund for the benefit of creditors, though established in nearly all the States, see 1 Cook, Corp. § 9, and once apparently the rule of the Federal courts, *Wood* v. *Dummer* (1824) 3 Mason C. C. R. 308; *Sawyer* v. *Hoag* (1873) 17 Wall. 610, 619; *Curran* v. *Arkansas* (1853) 15 How. 304, 307, has been repudiated in its application to solvent corporations by the Supreme Court of the United States in the case of *Collins* v. *Brierfield Iron Co.* (1893) 150 U. S. 371, in which it was declared that the property of such corporations was as fully within their control as that of an individual, and could only be converted into a trust fund by actual insolvency. See *MacDonald* v. *Williams* (1899) 174 U. S. 397. It would seem to follow from this doctrine that corporate assets improperly distributed prior to insolvency in the form of dividends could not be recovered by existing or future creditors. See *MacDonald* v. *Williams supra.* But just as the control of an individual over his property is limited as regards transfers in fraud of creditors, so, it would seem, the power of a corporation to destroy its creditors' security by diminishing the capital upon which they rely, if not entirely denied, should be so restricted as to prevent its reduction to the point of insolvency, a result which would verge upon actual fraud. See 1 Cook, Corp. § 9. Under the foregoing principles the defendant's retention of the dividends paid to its own knowledge improperly and in violation of statute, would have been clearly inequitable, and the principal case may be supported on this and the further ground that the trust-fund theory, though erroneous in principle, seems to be the established law of New York. *Hastings* v. *Drew* (1879) 76 N. Y. 9.

CORPORATIONS—TRANSFER OF STOCK—EFFECT OF FAILURE TO REGISTER.—A registered stockholder assigned his certificate to the plaintiff and subsequently became indebted to the corporation. *Held,* notwithstanding the failure to register the transfer, the defendant corporation could not off-set the indebtedness against a dividend payable to the assignee on dissolution. *Union Bank* v. *U. S. Exchange Bank* (N. Y. App. Div. 1911) 127 N. Y. Supp. 661. See Notes, p. 453.

DAMAGES—ATTORNEY'S FEES—RECOVERY IN INDEPENDENT SUIT.—The plaintiff gave the defendant a chattel mortgage to secure a note and the latter having wrongfully instituted foreclosure proceedings, the former paid the sum demanded, which was in excess of the amount due on the note. The plaintiff now seeks to recover as damages, in addition to the excess thus paid, his attorney's fees sustained in releasing his property from the foreclosure. *Held,* such fees were not

a proper element of damages. *Jenkins* v. *Commercial Nat. Bank* (Ida. 1911) 113 Pac. 463.

When the prevailing party in a suit at law is awarded costs he is presumably fully reimbursed for his expenses incurred during the trial, *Henry* v. *Davis* (1877) 123 Mass. 345, and hence attorney's fees may not be included as an element of damage. *Halstead* v. *Nelson* (N. Y. 1881) 24 Hun 395. In some States, however, in cases of bad faith or wilful injury, such damages are allowed in analogy to vindictive damages. *Linsley* v. *Bushnell* (1842) 15 Conn. 225. On the other hand, if the expenses sought to be recovered were sustained in a prior action which the plaintiff was forced to litigate by the default of the defendant, the charges of counsel may be recovered with the other expenses of the first suit if they were the reasonably necessary consequence of the wrongful act. *Chase* v. *Bennett* (1879) 59 N. H. 394; *Baxendale* v. *London etc. R. R. Co.* (1874) L. R. 10 Ex. 35; *Dubois* v. *Hermance* (1874) 56 N. Y. 673. Therefore when the defence in the prior action is frivolous or unnecessary, recovery of expenses sustained in its maintenance will be denied. *Baxendale* v. *London etc. R. R. Co. supra.* Assuming that the defendant in the principal case instituted the wrongful foreclosure wilfully the plaintiff was correctly allowed to recover the sum in excess of his obligation paid under such duress. Keener, Quasi-Contracts 416; *Chanler* v. *Sanger* (1874) 114 Mass. 364. The expenses of the defence, however, are controlled by the principles outlined above, and inasmuch as the plaintiff might have availed himself of a statutory remedy to test the foreclosure proceedings, Idaho Rev. Codes § 3418, in which he would doubtless have been awarded costs, it would seem that the expenses which the plaintiff seeks to recover were unnecessarily incurred, and hence, as the court properly decided, cannot be regarded as the natural result of the defendant's default. *Slingerland* v. *Bennett* (1876) 66 N. Y. 611.

EASEMENTS—WAYS OF NECESSITY—EXTINGUISHMENT.—The plaintiff, the owner of one parcel of land, purchased from one Gullet another parcel in favor of which there existed an easement of way of necessity over the land of the defendant. This way the defendant attempted to close. *Held,* the plaintiff acquired, as appurtenant to the Gullet tract, the way of necessity over the defendant's land and was entitled to use it whether he had another outlet or not. *Conley et al.* v. *Fairchild* (Ky. 1911) 134 S. W. 142.

The so-called way of necessity is not created by the mere fact of necessity, but originates in some change of ownership to which it is attached by construction as a necessary incident presumed to have been intended by the parties. *Collins* v. *Prentice* (1842) 15 Conn. 39; *Tracy* v. *Atherton* (1862) 35 Vt. 52. Accordingly an implied grant of such a way confers no more than the circumstances, which raise the implication of necessity, require should pass. *Holmes* v. *Goring* (1824) 2 Bing. 76; *cf. Proctor* v. *Hodgson* (1855) 10 Ex. 824; *Pierce* v. *Selleck* (1847) 18 Conn. 321; *Viall* v. *Carpenter* (Mass. 1859) 14 Gray 126. The way will therefore continue in favor of the dominant tenement so long as the necessity exists, *Logan* v. *Stogsdale* (1889) 123 Ind. 372, and no longer. *Carbonic Gas Co.* v. *Geyser Gas Co.* (N. Y. 1902) 72 App. Div. 304; *Russell* v. *Napier* (1889) 82 Ga. 770. This rule has been recognized by the court which decided the principal case. *Benedict* v. *Johnson* (Ky. 1897) 42 S. W. 335. It follows that a way created by necessity will cease upon the acquisi-

tion of another mode of passage, although less convenient. *New York Life Ins. Co.* v. *Milnor* (N. Y. 1846) 1 Barb. Ch. 353. Thus, whether the dominant tenant purchase other land over which he can pass to the place where the way of necessity leads, *Viall* v. *Carpenter supra,* or the dominant tenement be sold to a person who has another way thereto, see *Pierce* v. *Selleck supra,* the way of necessity is instantly extinguished. The court in the principal case, in refusing to consider the evidence offered as to the availability or suitability of other outlets open to the plaintiff, has apparently departed from the sound and established rule of law.

EMINENT DOMAIN—DISCONTINUANCE OF CONDEMNATION PROCEEDINGS—DAMAGES.—The City of New York passed a resolution to open a park and filed a map showing the contemplated improvement. After several years of protracted proceedings the resolution was rescinded. The plaintiff claimed damages for loss of the use of his land and inability to sell it during this period. *Held,* the complaint was not bad on demurrer. *Brown* v. *City of New York* (C. C. S. D. N. Y. 1910) 183 Fed. 888.

It is well settled that condemnation proceedings may be discontinued at any time before passing of title. *Matter of Military Parade Ground* (1875) 60 N. Y. 319; see *Benedict* v. *City of New York* (1899) 98 Fed. 789. The filing of the map of the contemplated improvement is merely to give general notice of the intent to appropriate the land, *Forster* v. *Scott* (1892) 17 N. Y. Supp. 479, and does not, in the absence of express provision to that effect, divest title. *Bauman* v. *Ross* (1897) 167 U. S. 548, 597. Indeed, if the condemnation statute attempts to restrict the free use and enjoyment of the land between the time of filing and the award, it is unconstitutional as a taking of property without compensation. *Forster* v. *Scott* (1893) 136 N. Y. 577. Hence the mere discontinuance of proceedings gives rise to no liability simply because a person has without compulsion refrained from using his land as he otherwise might have done, *Mayor, etc. of Baltimore* v. *Musgrave* (1877) 48 Md. 272, and similarly the loss of an opportunity to sell, resulting from the declared intention to appropriate the land, would seem to be *damnum absque injuria. Mallard* v. *City of Lafayette* (1850) 5 La. Ann. 112; *Carson* v. *City of Hartford* (1880) 48 Conn. 68. A recovery against a quasi-public corporation which has actually commenced condemnation proceedings and then after long delay discontinued them, *Leisse* v. *St. Louis etc. R. R. Co.* (1876) 2 Mo. App. 105, may perhaps be justified by reason of the restricted nature of the company's right of eminent domain. The application of such a doctrine to a municipality acting in its public capacity, however, seems improper, *Carson* v. *City of Hartford supra;* but see *McLaughlin* v. *Municipality No. 2* (1850) 5 La. Ann. 504, especially where condemnation proceedings have never been instituted. Hence the complaint in the principal case apparently stated no cause of action for damages resulting from discontinuance or delay.

EMINENT DOMAIN—PERSONS ENTITLED TO AWARD—GRANTOR AND GRANTEE.—After a city acquired title to land for a street, the former owner conveyed by warranty deed including the street in question "subject to any rights" that the city might have therein, and now claims the award subsequently made for the land condemned. *Held,* the conveyance passed the award to the grantee. *In re Hamilton Street, Queens Borough, City of New York* (1910) 127 N. Y. Supp. 36.

If the owner of land transfer legal or equitable title to a third person before title has passed under condemnation proceedings then in progress, it is not his interest but that of his grantee which is subsequently taken, and the latter is therefore alone entitled to the award. *Kiebler* v. *Holmes* (1894) 58 Mo. App. 119; *Gates* v. *De La Mare* (1894) 142 N. Y. 307. Where, however, the conveyance is made after title has passed but before the making of an award, the grantee acquires no interest in the award by virtue of his deed, *Smith* v. *Ry. Co.* (1890) 88 Tenn. 611; *Hood* v. *So. Ry. Co.* (1901) 133 Ala. 374; see *Home Ins. Co.* v. *Smith* (N. Y. 1882) 28 Hun 296, since the grantor's right thereto is a personal claim and as such will not pass except by express assignment. *Harlan County* v. *Hogsett* (1900) 60 Neb. 362; *Matter of Mayor* (N. Y. 1906) 116 App. Div. 252. Further, it has been decided in New York that a conveyance of all the grantor's right, title, and interest in the streets adjoining the premises granted does not operate as such an assignment, but merely constitutes a transfer of the reversionary rights contingent upon a possible abandonment by the public, *Harris* v. *Kingston Realty Co.* (N. Y. 1907) 116 App. Div. 704, a rule which the Appellate Division has reiterated since the decision in the principal case. *In re Opening of Crescent Street in City of New York* (1910) 127 N. Y. Supp. 37. The court in the principal case relies upon *Magee* v. *City of Brooklyn* (1894) 144 N. Y. 265, for the proposition that a full warranty deed has the effect of an express assignment. That decision, however, is by its terms *sui generis,* and hence only applicable where both the statutory taking and the grant occur long before the actual taking and award, and the grantee alone claims compensation. See *Matter of Mayor supra,* 256. An application of this doctrine is not warranted by the facts of the case under discussion, which therefore departs from the sound rule of its jurisdiction.

EVIDENCE—PRESUMPTION OF PAYMENT—ACTIONS TO RECOVER REALTY.—In an action of ejectment the defendant in possession under an executory sale pleaded payment and as proof relied on the presumption arising from lapse of time. No payment had been made or demanded for upwards of fifty years. *Held,* the presumption not having been overcome the action must fail. *Cannon* v. *Hileman* (Pa. 1911) 78 Atl. 932.

Independently of statute a debt is presumed to be paid after the lapse of twenty years. *Gregory's Ex'rs* v. *Comw.* (1888) 121 Pa. St. 611; *Smith's Ex'r* v. *Benton* (1852) 15 Mo. 371. Since this presumption, unlike the bar of the Statute of Limitations, is overcome by proof of non-payment, *De Ford* v. *Green* (Del. 1894) 1 Marv. 316, it clearly goes to the remedy only. Yet where the debt is secured, failure to rebut the presumption in an action to enforce the claim is incidentally destructive of the creditor's interest in the security. Thus it may render unenforceable a vendor's lien on real property. *Berger* v. *Waldbaum* (1904) 93 N. Y. Supp. 352. In its operation in favor of a mortgagor, *Fidelity Trust Co.* v. *Chapman* (1909) 226 Pa. St. 312, the presumption makes its nearest approach to affecting title affirmatively. Here, however, as in all the foregoing cases, since the action is primarily one to enforce the payment of a debt, the effect of the presumption is purely defensive. In the principal case, on the other hand, the action was to recover land, the title being admittedly in the

plaintiff. Now if instead of resisting an action of ejectment the defendant had been seeking a conveyance, he should not have been permitted to employ this presumption as an essential part of his cause of action. *Morey* v. *The Farmers' Loan & Trust Co.* (1856) 14 N. Y. 302; *Ellison* v. *Torpin* (1898) 44 W. Va. 414. Yet if it is to defeat ejectment the consequence is that, payment being presumed, the equitable estate is presumptively in the defendant, *Lawrence* v. *Ball* (1856) 14 N. Y. 477, and since he is therefore *prima facie* entitled to a conveyance, the defensive presumption becomes an instrument of offence affecting substantive rights. Accordingly in other jurisdictions this defense has been held inapplicable to an action to recover realty. *Lawrence* v. *Ball supra; Brady* v. *Begun* (N. Y. 1862) 36 Barb. 533; *Rankin* v. *Dean* (1908) 157 Ala. 490.

FEDERAL PRACTICE—REMOVAL OF CAUSES—JURISDICTION OF STATE COURT.—A suit for $5,000 damages, brought into a state court, was removed by the defendant to the federal court, and there dismissed at the plaintiff's instance. He subsequently brought a new action in the state court, laying his damages at less than $2,000. *Held,* the state court had jurisdiction. *B. & O. Ry. Co.* v. *Larwill* (Oh. 1910) 93 N. E. 620.

Although the jurisdiction of the state court was divested upon the removal of the case, and the federal jurisdiction thus acquired could not be affected by any change of conditions in the pending suit, *Clarke* v. *Mathewson* (1838) 12 Pet. 164; *Kanouse* v. *Martin* (1853) 15 How. 198, the plaintiff, upon payment of costs, was entitled to a dismissal without prejudice, U. S. Rev. Stat. § 914, and the effect of the dismissal was to divest the federal court of its jurisdiction. *Cotton Co.* v. *Starnes* (1904) 128 Fed. 183. The contention that the removal gave the federal court exclusive jurisdiction of the cause until an adjudication upon the merits finds no support in the phraseology of the statute providing for removal; U. S. Comp. Stat. (1901) § 509; *Young* v. *Tel. Co.* (1906) 75 S. C. 326; nor is the spirit of the statute evaded, as it aims to restrict the litigation of small claims to the state court, and if the latter had no jurisdiction, the action could not be tried anywhere. *Cleveland Ry. Co.* v. *Lawler* (1900) 94 Ill. App. 36. Although a cause can be reinstated only by the court that dismissed it, the commencement of a new suit, even if for the same cause of action, is not a reinstatement, but a distinct and independent action. *McIver* v. *Florida Ry. Co.* (1904) 110 Ga. 223. The validity of the second suit is recognized in criminal cases, *Bush* v. *Kentucky* (1882) 107 U. S. 110, and a plea in abatement will not be sustained in a civil action, though instituted before the dismissal in the federal court, provided the dismissal occurs before the trial of the plea. *Wilson* v. *Milliken* (1898) 103 Ky. 165; *Texas Ry. Co.* v. *Kenna* (Tex. 1899) 52 S. W. 555; *Harby* v. *Patterson* (Tex. 1900) 59 S. W. 63. If the second suit is vexatious, however, the courts will not countenance it, *Yawkey* v. *Richardson* (1862) 9 Mich. 529, so there is no danger of abuse of the rule laid down in the principal case, which rightly overrules the erroneous doctrine formerly obtaining in its jurisdiction. *B. & O. Ry. Co.* v. *Fulton* (1899) 59 Oh. St. 575.

INTERSTATE COMMERCE—SHERMAN ANTI-TRUST ACT—TREBLE DAMAGES CLAUSE.—The plaintiff sued for treble damages under § 7 of the Sher-

man Anti-Trust Act alleging that the defendant corporation had, by an illegal combination in restraint of trade, caused the insolvency of a corporation of which the plaintiff was a stockholder and creditor. *Held,* the plaintiff was not entitled to maintain such a suit. *Loeb* v. *Eastman Kodak Co.* (C. C. A. 3rd C. 1910) 183 Fed. 704.

Although the section of the Sherman Act under which this action was brought is broad in its terms, giving, as it does, a right of action to "any person who shall be injured in his business or property" by reason of any of the acts declared therein to be unlawful, 26 U. S. Stat. at L. 216, and although in at least one case it has made actionable injuries which would not have been so before its enactment, *Chattanooga Foundry Works* v. *Atlanta* (1906) 203 U. S. 390; 4 COLUMBIA LAW REVIEW 442, the general rule of interpretation adopted by the courts seems to be that it is merely a recognition of common law rights plus a statutory measure of damages, and that it does not affect those principles of the common law by which in a given case must be determined whether or not a given individual has in legal contemplation suffered an actionable wrong. *Ames* v. *American Tel. & Tel. Co.* (1909) 166 Fed. 820. It naturally follows, therefore, that the principal case is governed by the well settled rule of law that unless a stockholder is damaged peculiarly, *Ritchie* v. *McMullen* (1897) 79 Fed. 522, 535; *Walsham* v. *Stainton* (1863) 1 DeG. J. & S. 678, the right of action for torts committed against a corporation lies primarily in the corporation itself, see *Kelly* v. *Mississippi Coaling Co.* (1909) 175 Fed. 482; *Converse* v. *United Shoe Machinery Co.* (1904) 185 Mass. 422, and it is only where the officers of the corporation have refused to sue or circumstances make it inexpedient that they should be allowed to maintain the action that the individual stockholder may sue for the benefit of himself and others similarly situated. *Flynn* v. *Brooklyn R. R. Co.* (1899) 158 N. Y. 493, 508. In the light of these decisions the court in the principal case was unquestionably correct in sustaining the defendant's demurrer to the complaint.

JUDGMENTS—REPEAL OF STATUTE—EFFECT ON PENDING ACTION—PENDENCY.—A statutory action to force the defendant into involuntary liquidation having been successfully prosecuted to judgment and affirmed on appeal, the defendant moved for a new trial. This being overruled he appealed, and during the pendency of this appeal the act under whose authority the original action had been instituted was repealed. *Held,* such action was unaffected by the repeal. *People* v. *Bank of San Luis Obispo* (Cal. 1911) 112 Pac. 866. See Notes, p. 461.

JUDGMENTS—RES ADJUDICATA—NEGLECT TO PLEAD COUNTERCLAIM AS A BAR TO SUIT THEREON.—An action brought by the vendor of silk for the purchaser's refusal to accept delivery was dismissed on the merits. Later the purchaser sued the vendor for non-delivery of the goods. *Held,* one judge dissenting, since the plaintiff's cause of action might have been set up in the earlier suit as a counterclaim, it was barred by the judgment in that action. *Lessler* v. *Gerli* (1911) 126 N. Y. Supp. 697.

While a judgment between the parties is conclusive in a subsequent suit upon the same cause of action as to everything which might have been litigated in the first action, if the later suit be upon a different cause of action a prior judgment operates as an estoppel only as to

matters actually determined in the earlier proceeding. *Cromwell* v. *County of Sac* (1876) 94 U. S. 351; *Foye* v. *Patch* (1882) 132 Mass. 105. Consequently, since the counterclaim constitutes an independent cause of action which the defendant may either plead as a defense or make the basis of a separate action, *Uppfalt* v. *Woermann* (1890) 30 Neb. 189, a judgment in the prior suit is not conclusive on such demand, even though both are founded on the same contract, *Barker* v. *Cleveland* (1869) 19 Mich. 230; *Barth* v. *Burt* (N. Y. 1865) 43 Barb. 628, unless it was expressly or by necessary implication adjudicated therein. *Robbins* v. *Harrison* (1857) 31 Ala. 160; *McDonald* v. *Christie* (N. Y. 1863) 42 Barb. 36. The contrary doctrine, virtually depriving one of his right to begin suit at his own convenience, would be manifestly unjust. Bigelow, Estoppel (3rd ed.) 125. Obviously, even though no counterclaim was set up in the prior action, a judgment therein based on, and thereby determining, the existence of facts upon whose non-existence the counterclaim is predicated, will be a bar to suit upon the latter. *Davis* v. *Tallcot* (1854) 12 N. Y. 184; *Goble* v. *Dillon* (1882) 86 Ind. 327. In the principal case, however, the prior judgment for the present plaintiff could constitute no bar, since it did not decide that there had been a valid tender of delivery. As it does not appear that the case was governed by §§ 2947, 2948, N. Y. Code Civ. Pro., requiring a defendant in a contract action begun in a justice's court to set up certain counterclaims or be forever barred from suing thereon, the dissenting opinion seems correct.

LANDLORD AND TENANT—ASSIGNMENT OF LEASE—PRESUMPTION.—The plaintiff leased a saloon to a brewery and the latter rented it to the defendant at the same rental. Although the defendant was not required by his lease from the brewery to pay the rent to the plaintiff, he did so for some time. Later the plaintiff sued the defendant for unpaid rent as assignee of the original lease. *Held*, the defendant was a sub-tenant, not an assignee, and therefore not liable. *Davis* v. *Vidal* (Tex. 1911) 133 S. W. 1074.

Where a person other than a lessee is shown to be in possession of leased premises, paying rent to the original landlord, the law will presume that the lease has been assigned to him, *Dickinson Co.* v. *Fitterling* (1897) 69 Minn. 162, on the ground that the nature of his right is a fact peculiarly within the knowledge of the one in possession. *Ecker* v. *Chicago etc. R. Co.* (1880) 8 Mo. App. 223; *Bedford* v. *Terhune* (1864) 30 N. Y. 453. This presumption may be rebutted by showing that the alleged sub-lease is for a period shorter than the original term, *Holford* v. *Hatch* (1779) 1 Doug. 183; *Dartmouth College* v. *Clough* (1835) 8 N. H. 22, or by any facts going to show that there never was a valid assignment. *Welsh* v. *Schuyler* (N. Y. 1876) 6 Daly 412; *Cross* v. *Upson* (1864) 17 Wis. 618. Mere proof of an agreement in the form of an under lease, however, is not sufficient, for where a lessee makes a new lease for a term equal to or greater than his own, it amounts to an assignment of the original lease, *Wollaston* v. *Hakewill* (1841) 3 M. & G. 297; *Beardman* v. *Wilson* (1868) L. R. 4 C. P. 57, in spite of its reservation of a new rent payable to the assignor together with the power of re-entry for non-payment, or its attempted assumption of the character of a sub-lease. *Parmenter* v. *Webber* (1818) 8 Taunt. 593; *Stewart* v. *L. I. R. R. Co.* (1886) 102 N. Y. 601. Unless, therefore, the defendant in the principal case proved that his term was shorter than that of the lessee, a fact which does not appear from the report, the decision is incorrect.

LIMITATION OF ACTIONS—ACKNOWLEDGMENT TO ASSIGNOR—RIGHTS OF ASSIGNEE.—The payee of a note secured by a chattel mortgage assigned it as collateral security. In an action thereon the assignee relied on an acknowledgment made to his assignor after the assignment to toll the Statute of Limitations. *Held,* the acknowledgment was sufficient. *Girard Trust Co.* v. *Owen* (Kan. 1911) 112 Pac. 619.

According to the weight of authority a creditor may recover the amount of an outlawed debt only when an acknowledgment of it may be construed as a new promise made in consideration of the antecedent debt, Wood, Limitations §§ 64, 68; *Wakeman* v. *Sherman* (1853) 9 N. Y. 85, and not because the defense has been waived. 8 COLUMBIA LAW REVIEW 44. Hence the assignee in the principal case was relying on a promise made to another. The logical difficulty of this position, untenable where the assignor has parted with his entire interest, *Investment Co.* v. *Bergthold* (1899) 60 Kan. 813, is obvious. Yet inasmuch as the Statute was designed to protect the courts from being overrun with stale claims, Wood, Limitations § 4, and to avoid frauds and mistakes, Wood, Limitations § 7; *Bell* v. *Morrison* (1828) 1 Pet. 351, 360, it would seem that the true reason for an exception to its operation is the practical one that it would be unjust to deny the creditor his claim when the debtor has placed its validity beyond dispute by promising, expressly or impliedly, to pay. As this exception is the result of judicial legislation, Wood, Limitations § 6; *A'Court* v. *Cross* (1825) 3 Bing. 329, the theory that the recovery is on a new promise was probably adopted in explanation of a result reached independently thereof, in order to impart to the judicial tendency in construing the Statute a needed certainty and moderation. *Bell* v. *Morrison supra;* Wood, Limitations § 65. It might therefore be expected that such a theory would be adhered to with no great rigidity and that where two parties have an interest in the same debt an acknowledgment to one should operate in favor of the other, a tendency illustrated in the case of an acknowledgment made to the heir of a deceased creditor, see *Hubbard's Adm'r* v. *Clark* (N. J. 1886) 7 Atl. 26, or to his widow. See *Hodnett* v. *Gault* (N. Y. 1901) 64 App. Div. 163. From this point of view the principal case seems justifiable.

MISTAKE—MISTAKE OF FACT—RECOVERY OF MONEY PAID ON A FORGED INSTRUMENT.—The plaintiff, the drawee of a forged check, sought to recover back from the defendant, an innocent holder, the amount paid him upon the check under a belief that it was genuine. *Held,* the plaintiff could recover. *American Express Co.* v. *State National Bank* (Okla. 1911) 113 Pac. 711. See Notes, p. 464.

MORTGAGES—FUTURE ADVANCES—PRIORITY.—A corporation executed a mortgage to secure bonds that might be issued in the future. Thereafter, an attachment was levied on its property. Later the bonds were issued to purchasers in good faith. *Held,* the lien of the bondholders should be given priority to that of the attaching creditor. *In re Sunflower State Refining Co.* (D. C., D. Kan. 1911) 183 Fed. 834. See Notes, p. 457.

MUNICIPAL CORPORATIONS—WATERWORKS—WATER SUPPLIED TO NON-RESIDENTS.—Under statutory authorization the defendant furnished the non-resident plaintiff with water under a contract indefinite as to time and price, and gradually raised his rate until it was four times

that of residents. The plaintiff refused to pay the charge and sought to enjoin the city from cutting off his water supply. *Held,* the injunction should not issue. *Childs* v. *City of Columbia* (S. C. 1911) 70 S. E. 296.

Municipal corporations have a dual capacity, 1 Dillon, Mun. Corps. (4th ed.) §§ 27, 66 *et seq.,* and it is well settled that a municipality supplying gas or water to its inhabitants acts as a private corporation, *Reed* v. *City of Anoka* (1902) 85 Minn. 294, and is then subject to all the duties and disabilities of the latter. *Bailey* v. *Mayor of New York* (N. Y. 1842) 3 Hill 531. It thus comes under the operation of the rule obliging all private corporations engaged in a business impressed with a public interest to serve their patrons without discrimination and at reasonable rates. If the defendant in the principal case had only served non-residents in a few sporadic instances, it could not be considered a public utility as to such service; Beale & Wyman, Railroad Rate Regulation § 128; but assuming, as the facts warrant, that non-residents had commonly been served, the city must be taken to have held itself out as ready to serve all of that class as long as the supply of water exceeded the needs of the municipality. *Cf. Dwight* v. *Brewster* (Mass. 1822) 1 Pick. 50; *Slosser* v. *Salt River Canal Co.* (1901) 7 Ariz. 376. It was entirely optional with the defendant to accept the powers conferred by the statute, *City of Charlotte* v. *Sheppard* (1897) 120 N. C. 411, which, on the above assumption, cannot be construed as allowing unreasonable rates. *Wagner* v. *City of Rock Island* (1893) 146 Ill. 139. It necessarily follows that the defendant could not refuse to supply the plaintiff unless it withdrew entirely from the service of non-residents. In this view of the case it is difficult to support the reasoning of the decision which would refuse an injunction if the rate charged were in fact unreasonable.

PARTNERSHIP—INFANT AS PARTNER—RECOVERY OF FIRM ASSETS.—A partnership consisting of an infant and an adult filed a bill in equity asking relief from a contract on which money had already been advanced by them. *Held,* although the minor was freed from further individual liability, he could not recover the money paid out by the firm. *Latrobe* v. *Dietrich* (Md. 1910) 78 Atl. 983. See Notes, p. 468

POWERS—NATURE OF INTEREST IN DEFAULT—INTERIM INCOME.—A fund was settled upon trustees to pay the income to A. M. for life, then to her husband H. M. for life or until he should become a bankrupt, the trustees to stand possessed of the income and fund for such of the children or other issue to H. M. and A. M. as they or the survivor should appoint, and, in default of appointment, to the children. After the death of A. M., H. M. became bankrupt, and has not exercised the power. *Held,* the income until the exercise of the power should be divided equally among the children to take in default. *Re Master's Settlement Trusts* (1910) 103 L. T. 899.

In case of the limitation of a life estate to a person incapable of taking with a remainder over to an ascertained person *in esse,* the vested remainderman takes immediately. 2 Reeves, Real Prop. § 910; *U. S. Trust Co.* v. *Hogencamp* (1908) 191 N. Y. 281. When such estates, however, have been created by appointment under a power, if the immediate appointee is incompetent the income goes to the taker in default in preference to the next taker under the exercised power, because it is clearly the intention of the donor of the power that the

donee in default shall take whatever is not validly appointed. *Crozier* v. *Crozier* (1843) 3 D. & W. 353; 1 Jarman, Wills (6th Eng. ed.) 725. The attainment of a like result in the principal case is based on the ground that the interest of the donee in default is vested, a doctrine which is well established by modern authority. 1 Sugden, Powers (1st Am. ed.) 151. But when a vested remainder is preceded by a contingent interest, on the failure of the immediate particular estate the income during the interim goes to the next of kin or heir of the donor and not to the remainderman; *Carrick* v. *Errington* (1728) 5 Br. P. C. 391; and hence the mere fact that the future interest is vested does not necessarily give rise to acceleration. Obviously, however, the disposition of property under an instrument creating a power is controlled by the donor's intention, and on this ground the principal case may be supported. For while it has never before been decided that the donee in default is entitled to anything accruing before the power is extinguished, there is much force in the argument that the donor could not have anticipated any lapse and therefore wished any unprovided interest to go to the takers in default.

STATUTE OF FRAUDS—PARTNERSHIP FOR SPECULATION IN LAND.—The plaintiff orally agreed with the defendant to become partner in the location of mining properties. *Held,* the agreement did not violate the Statute of Frauds. *Hardin* v. *Hardin* (S. D. 1910) 129 N. W. 108. See Notes, p. 459.

TAXATION—TRANSFER TAX—ANTENUPTIAL CONTRACT.—Under an act taxing transfers by will or by the interstate laws and gifts in contemplation of death, the State sought to collect a tax on a sum due under an antenuptial contract which recited that if the wife survived the husband, she should have out of his property a certain sum in lieu of any claim she might have as his widow. *Held,* the tax was due. *People* v. *Field's Estate et al.* (Ill. 1911) 93 N. E. 721.

Antenuptial contracts have long been enforced at law, *Milbourn* v. *Ewart* (1793) 5 T. R. 381, as creating a debt binding on the husband's estate and not as partaking of a testamentary character. *Huguley* v. *Lanier* (1890) 86 Ga. 636, the presumption being that the agreement was made in contemplation of life rather than of death. *Matter of Baker* (N. Y. 1903) 83 App. Div. 530, aff'd. 178 N. Y. 575. Therefore, since in the principal case there appears to have been no evidence that a gift was intended and the agreement was not made in view of impending death, see *Rosenthal* v. *People* (1904) 211 Ill. 306; *People* v. *Kelley* (1905) 218 Ill. 509, the court might have regarded the contract as establishing a debt against the estate which would not be subject to the tax, *Matter of Baker supra,* for the policy of the statute is to levy only on the assets of the estate. See Hurd's R. S. (1909) 1900; *Matter of Westurn* (1897) 152 N. Y. 93. However, the court chose to regard the provision for the wife as a substitute for dower, which in Illinois is regarded as an interest passing under the intestate laws and hence subject to the duty on transfers, *Billings* v. *People* (1901) 189 Ill. 472, a conclusion which is justifiable as a broad construction of the statute. But see *Matter of Gould* (1898) 156 N. Y. 423. In other jurisdictions, however, a different result has been reached for, although dower is inchoate during the husband's life and is not a vested estate, *Witthaus* v. *Schack* (1887) 105 N. Y. 332, it possesses elements of property which equity will protect, *Buzick* v. *Buzick* (1876) 44 Ia. 259; *Madigan* v.

Walsh (1868) 22 Wis. 478, and is therefore not regarded as an estate passing under the intestate laws. See *Matter of Riemann* (N. Y. 1904) 42 Misc. 648; *Matter of Starbuck* (N. Y. 1910) 137 App. Div. 866.

TRUSTS—ACCEPTANCE OF GIFTS BY TRUSTEE—LIABILITY TO BENEFICIARY.—The defendant, holding property in trust for the plaintiffs, employed with their approval a broker for a fixed commission to procure a purchaser of the *res* at a fixed price. The plaintiffs sought to recover the portion of the commission paid by the broker to the trustee after the sale without a previous agreement. *Held,* they were not entitled to recover. *Heckscher* v. *Blanton* (Va. 1911) 69 S. E. 1045.

It is familiar law that a trustee cannot use his fiduciary position for his own advantage but must account to the *cestui que trust* for all benefits received. Lewin, Trusts 292, 294; *Sherman* v. *Lanier* (1884) 39 N. J. Eq. 249. He can neither purchase the trust property nor strengthen his credit by its use. *Frazier* v. *Jeakins* (1902) 64 Kan. 615. For his services he is entitled only to the payment provided by law and may not make other profits either directly or indirectly. Perry, Trusts (5th ed.) §§ 209, 427; *Schieffelin* v. *Stewart* (1815) 1 Johns. Ch. 620. It is immaterial whether such additional benefit results from a use of the trust funds or from the trust relation itself, *Sugden* v. *Crossland* (1856) 3 Sm. & Giff. 192, or whether the trustee acted fraudulently or in good faith. *Frazier* v. *Jeakins supra.* It is not even necessary that the trust estate suffer a loss, provided that the trustee gain a profit. *White* v. *Sherman* (1897) 168 Ill. 589, 611. The reason for such a rule is found in public policy since, by removing all hope of reward other than the legal compensation, it tends to prevent the trustee from assuming a position hostile to the interest of the *cestui que trust.* The law is thus not remedial merely, but deterrent as well in its effect. *Frazier* v. *Jeakins supra.* A sound application of these principles would not countenance the receipt of gratuities by a trustee from those with whom he has dealt, *Jacobus* v. *Munn* (1883) 37 N. J. Eq. 48; Loring, Trustee's Handbook (3rd ed.) 32, 35, even after the close of the trust relation, for the knowledge of such a possibility could easily influence his conduct. It would therefore seem that the court in the principal case erred in not applying these principles, for however limited the power of the trustee, there should be no opportunity for personal gain by its abuse. Even if the contrary rule, which seems to obtain in the law of agency, is sound, *Aetna Ins. Co.* v. *Church* (1871) 21 Oh. St. 492, it would be hazardous to extend it to the case of a trustee.

WILLS—INCORPORATION BY REFERENCE.—A testator in a duly executed will referred to a then existing contract of a certain date. *Held,* in the absence of express intention to that effect there could be no incorporation by reference. *In re Martindale's Will* (1910) 127 N. Y. Supp. 887. See Notes, p. 454.

WITNESSES—COMPETENCY UNDER NEW YORK CODE—TRANSACTIONS WITH DECEASED PERSONS.—The defendant asserted title to securities under an alleged gift to his deceased wife by the plaintiffs' intestate made during a conversation in which he did not participate and which made no reference to him although had in his presence. His testimony of this transaction was objected to under § 829 of the New York Code which disqualifies an interested party from testifying against an

administrator concerning a personal transaction or communication with the deceased. *Held,* two judges dissenting, the witness was incompetent. *Griswold et al.* v. *Hart* (1911) 126 N. Y. Supp. 1011.

Under the code section a disqualifying interest exists if by the legal operation of the judgment the witness will gain or lose, or the record may be evidence for or against him in some other action. See *Talbot* v. *Laubheim* (1907) 188 N. Y. 421; *Connelly* v. *O'Connor* (1889) 117 N. Y. 91. As the section is designed to prevent undue advantage and possible perjury, see *Price* v. *Price* (N. Y.1884) 33 Hun 69, it is probable that the legislative intention was to exclude evidence even if the interest was acquired subsequently to the transaction or conversation. In probate proceedings testimony by legatees as to personal transactions with the deceased is uniformly excluded, *Matter of Eysaman* (1889) 113 N. Y. 62; *Holland* v. *Holland* (N. Y. 1904) 98 App. Div. 366, although before the testator's death they have no such interest as the Code contemplates. See *Talbot* v. *Laubheim supra.* The defendant in the principal case was, therefore, an incompetent witness, *Stillwell* v. *Boyer* (N. Y. 1897) 21 App. Div. 231, if he was a party to the transaction. Defining a personal transaction between witness and deceased, the courts have in some instances apparently limited it to cases where the former participated by word or act or was in some way referred to, see *Hutton* v. *Smith* (1903) 175 N. Y. 375, but in actions to set aside written instruments, because of fraud, the mere presence of the witness is held to debar his evidence. *Holcomb* v. *Holcomb* (1884) 95 N. Y. 316, 327; *Burdick* v. *Burdick* (1905) 180 N. Y. 261. Since there appears to be no valid ground for such a distinction the principal case seems sound. 8 COLUMBIA LAW REVIEW 650; but see *Eighmie* v. *Taylor* (N. Y. 1893) 68 Hun 573.